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No. 85-702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RAUL MADRID, *et al.*,

Petitioners,

v.

ANTONIA MONTELONGO, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS J. BACAS
24 Sixth Street, S.E.
Washington, D.C. 20003
Attorney for Petitioners

Of Counsel:
JACK L. MCGOWEN
Pecos, Texas 79772

December 23, 1985

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Petitioners Raul Madrid, *et al.* submit this reply brief in support of their petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit pursuant to Sup. Ct. R. 22.5. In their Brief in Opposition, respondents argue that "neither the decision below nor the record raises the questions presented in the petition." Brief in Opposition, at 1. To the extent respondents are suggesting that the questions were not raised below, petitioners wish to dispel that misleading impression.

In support of their motion for summary judgment in the district court, the individual growers argued that the class action tolling rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), did not apply to them. Counter-claim Defendants' Motion for Summary Judgment, at 12-14 (filed Sept. 22, 1983). The workers themselves argued that the tolling rule was available to them. In Intervenors' Response to Counter-Claim Defendants' Motion for Summary Judgment, at 12-13, the workers stated that "[o]nce it is

established that the amendment naming the members of PVFA was either unnecessary or related back to the date of the original counterclaim, then the amendment also relates back on behalf of the class Lara and Zungia [sic] had named in both the original and amended counterclaims since class certification had not yet been ruled upon. After the class certification was denied April 5, 1983, the statute of limitations began to run against the class, but because the statute had been tolled since July 13, 1978, Intervenors had ample time to preserve their claims and did so." Of course, the district court itself followed the suggestion of the workers and ruled that the original class action counterclaim tolled the statute of limitations with respect to the individual growers. *See* Petition for Writ of Certiorari, at A-19.

The first issue raised by the growers in their brief to the court of appeals dealt with the statute of limitations. The growers stated that "[a]lthough the statute of limitations may have been tolled by the filing of the class action counterclaim, . . . such tolling would only apply to the Association, the only named counterclaim defendant, and not to the individual growers." Brief for Appellees-Cross Appellants, at 28. Similarly, in their Reply Brief, the growers stated that "[t]olling of the statute of limitations by virtue of the filing a [sic] class action is especially inappropriate with respect to the individual growers not even named in the original counterclaim since the Mexican workers did not even add their FLCRA claims until they amended their counterclaim and did not advance their legal theories of individual grower liability until after the trial." Reply Brief for Appellees-Cross Appellants, at 8-9. The issue was also addressed at oral argument.

The workers are correct in noting that the court of appeals did not address the class action tolling issue in its opinion, but the court of appeals' inexplicable failure to address the issue does not mean that it was not properly raised in the district court and court of appeals. In fact, the growers were so baffled by the court of appeals' failure

to address the principal issue raised on their appeal that they filed a Suggestion for Rehearing En Banc which set forth the issue of class action tolling in full detail. Without comment, the court of appeals denied the rehearing.

Thus, the record is clear that the class action tolling question was raised by both parties in the district court, was relied on by the district court in reaching its decision, and was raised on appeal to the court of appeals. The same is true of the Fed.R.Civ.P. 15(c) relation back issue. The failure of the court of appeals to even address the class action tolling issue and its cryptic ruling on the Rule 15(c) relation back issue say less about the state of the record than about the quality of the court of appeals' decision.

Finally, petitioners would note that the workers have erroneously contended that the two cases relied on by petitioners in their petition for writ of certiorari have been overruled by this Court's decision in *Crown, Cork, & Seal Co. v. Parker*, 462 U.S. 345 (1983). Brief in Opposition, at 3. *Crown, Cork & Seal* dealt only with the narrow issue of whether class action tolling extends to putative class members who file independent causes of action following denial of class certification or whether it is limited to those who intervene in the original action. This Court ruled that it extends both to those who file original causes of action as well as those who intervene. Both *Arneil v. Ramsay*, 550 F.2d 774 (2d Cir. 1977), and *Wachovia Bank and Trust Co. v. Nat'l Student Marketing*, 461 F.Supp. 999 (D.D.C. 1978), *aff'd*, 650 F.2d 342 (D.C.Cir. 1980), *cert denied*, 452 U.S. 954 (1981), were overruled to the extent that they had limited class action tolling to those who intervened, but the other issues raised in those cases, specifically whether class action tolling applies to persons not named as defendants in the class action complaint, were not addressed in *Crown, Cork & Seal*. The workers' statement that the cases relied on by the growers in support of their petition have been overruled is certainly misleading, to say the least.

CONCLUSION

For the reasons set forth above and the reasons set forth in the Petition for Writ of Certiorari, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

THOMAS J. BACAS
24 Sixth Street, S.E.
Washington, D.C. 20003
202/543-7211
Attorney for Petitioners

Of Counsel:
JACK L. MCGOWEN
Pecos, Texas 79772

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